

FILED
Court of Appeals
Division II
State of Washington
4/16/2019 4:22 PM

NO. 51734-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SAMMY WEAVER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

DEVON KNOWLES
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ARGUMENT 1

Jury Instruction No. 14 defining knowledge relieved the State of its burden to prove each element in the to-convict instruction beyond a reasonable doubt. 1

1. The jury instructions relieved the State of its burden to prove an element of the offense beyond a reasonable doubt, a manifest error that can be raised for the first time on review. 2

2. The State did not meet its burden to prove the error was harmless. 4

C. CONCLUSION 7

TABLE OF AUTHORITIES

United States Supreme Court

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....5

Washington Supreme Court

City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733 (2002) 6

State v. Hickman, 35 Wn.2d 97, 954 P.2d 900 (1998) 2, 4, 7

State v. Stein, 144 Wn.2d 236, 27 P.3d 184 (2001)..... 4

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 4

Washington Court of Appeals

In re Pers. Restraint of Hegney, 138 Wn. App. 511, 158 P.3d (2007)...2

State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005) 3

State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009) 3, 5

State v. Ridgley, 141 Wn. App. 771, 174 P.3d 105 (2007)..... 4

State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010)..... 2

Statutes

RCW 9A.52.090 6

Rules

RAP 2.5..... 4

A. INTRODUCTION

Read as a whole, the jury instructions in this case are contradictory, utterly confusing, and relieved the State of its burden to prove the element in the to-convict instruction that Mr. Weaver knew his entry was unlawful beyond a reasonable doubt. This Court should reverse and remand for a new trial.

B. ARGUMENT

Jury Instruction No. 14 defining knowledge relieved the State of its burden to prove each element in the to-convict instruction beyond a reasonable doubt.

The State appears to concede that the to-convict instruction (Instruction No. 13) created the additional element that Mr. Weaver knew his act of entering or remaining was unlawful. Suppl. Br. of Resp't at 6. The State additionally concedes that the instruction became law of the case. Suppl. Br. of Resp't at 6. Although not explicitly conceding the issue, the State does not address the argument that the instruction defining knowledge (Instruction No. 14) relieved the State of its burden to prove the element. Suppl. Br. of Resp't. 6-8. Instead, the crux of the State's argument appears to be that, because it would not otherwise have been required to prove the element, the error is immune from challenge and is harmless. *See* Suppl. Br. of Resp't at 6-8. These arguments lack merit and should be squarely rejected by this Court.

1. *The jury instructions relieved the State of its burden to prove an element of the offense beyond a reasonable doubt, a manifest error that can be raised for the first time on review.*

Under the law of the case doctrine, once included into the to-convict instruction, Mr. Weaver's knowledge that his entry or remaining on the premises was unlawful became an element of the offense that the State was required to prove beyond a reasonable doubt. *State v. Hickman*, 35 Wn.2d 97, 102, 954 P.2d 900 (1998). Despite acknowledging this burden in its response brief, the State declines to argue that it met its burden or address Mr. Weaver's argument that Instruction No. 14 relieved it of this burden. *See* Suppl. Br. of Resp't at 6-8. Instead, the State isolates the to-convict instruction as unchallengeable or harmless because it provided additional protection to Mr. Weaver. *See* Suppl. Br. of Resp't at 7-8.

This argument fails on two grounds: First, Mr. Weaver does not challenge the validity of to-convict instruction in itself; it is Instruction No. 14 defining knowledge that relieved the State of its burden to prove every element in the to-convict instruction. Second, the State's argument ignores the clear legal precedent that claimed errors in jury instructions are evaluated 'in the context of the instructions as a whole.'" *State v. Sublett*, 156 Wn. App. 160, 185, 231 P.3d 231 (2010) (citing *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 521, 158 P.3d (2007)).

State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), illustrates Mr. Weaver's argument. In *Goble*, the State charged the defendant with third degree assault, alleging he assaulted a law enforcement officer. *Id.* at 196. The to-convict instruction added the unnecessary element that the defendant must know that the victim was a law enforcement officer, making the element the law of the case. *Id.* at 201. For the first time on appeal, the defendant argued that, because the State was required to prove knowledge of the victim's status, a separate instruction allowing the jury to find the defendant acted knowingly if he acted intentionally relieved the State of its burden to prove this element. *Id.* at 202. This Court reversed, finding the instruction confusing and agreeing that it relieved the State of its burden as the jury could find that the defendant had knowledge of the victim's status if the assault was intentional. *Id.*; see also *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009) (instruction defining recklessness relieved the State of its burden of proof as jury could conclude reckless infliction of harm by finding intentional assault).

In this case, as in *Goble*, the to-convict instruction is not the problem. The problem is that, once the to-convict instruction incorporated the additional element that Mr. Weaver knew his entry was unlawful, the subsequent instruction defining knowledge relieved the State of its burden by explicitly stating that "[i]t is not necessary that the person know that

the fact, circumstance, or result is defined by law as being unlawful or an element of the crime.” It is well settled that “[j]ury instructions that relieve the State of its burden to prove every element of an offense violate due process.” *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Such errors are of constitutional magnitude that can be raised for the first time on appeal. *State v. Ridgley*, 141 Wn. App. 771, 779, 174 P.3d 105 (2007) (citing *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001)); RAP 2.5(a)(3). That the instructional error involves an unnecessary element is of no legal significance. *See Hickman*, 35 Wn.2d at 102 (citing *State v. Ng*, 110 Wn.2d 32, 39, 750 P.2d 632 (1988)).

The State’s argument that, because the to-convict instruction alone did not relieve it of its burden, is a red herring. Read as a whole instructions were confusing, misleading, and relieved the State of its burden to prove Mr. Weaver knew he was committing a crime. The issue is properly in front of this Court under RAP 2.5(a)(3).

2. *The State did not meet its burden to prove the error was harmless.*

Where jury instructions relieve the State of its burden to prove an element of an offense, it is an error of constitutional magnitude and the

State bears the burden of proving the error was harmless. *See Goble*, 131 Wn. App. at 203-04. Specifically, the State must show beyond a reasonable doubt that the error did not contribute to the verdict. *Hayward*, 152 Wn. App. at 647; *see also Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (“Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”).

Here, Mr. Weaver’s sole defense was that he did not know the entry was unlawful – instead, he believed his friends still live in the home and would have allowed him to enter. He testified as to the names of his friends and that he visited the home in the past. RP 101, 110. The jury acquitted Mr. Weaver of the residential burglary, suggesting they found him credible, at least in part. CP 51. While some of Mr. Weaver’s testimony conflicted with that of other witnesses, other portions were corroborated.

The State does not contend that, had the jury credited Mr. Weaver’s defense, it would negate the element of knowledge. Rather, the State appears to argue that the error was harmless because the jury convicted Mr. Weaver. *See Suppl. Br. of Resp’t* at 7-8. Specifically, “the jury’s verdict of guilty would show that the jury necessarily found that

Weaver knew” that his entry onto the premises was unlawful. Suppl. Br. of Resp’t at 7.

Again, the State’s argument focuses on the to-convict instruction in isolation. Moreover, this argument is circular and assumes what it seeks to prove. The issue isn’t whether the jurors found the State met its burden regarding knowledge, the issue is that Instruction No. 14 allowed the jury to assume that Mr. Weaver was acting with knowledge without the State proving that he actually knew the conduct was illegal. Thus, the instructional error *allowed the jury to convict Mr. Weaver even if they believed his defense*. Such a finding is prohibited under RCW 9A.52.090(3), providing that, in any prosecution for criminal trespass, it is a defense that “[t]he actor reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him or her to enter or remain[.]”; *see also City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (statutory defense negates the unlawful presence element of criminal trespass). Under the State’s line of reasoning, the only true way to prove the error harmless was if the jury acquitted Mr. Weaver.

The State also appears to suggest that the error was harmless because the State only needed to prove Mr. Weaver was there unlawfully. *See* Suppl. Br. of Resp’t at 7-8. In other words, the jury’s finding that Mr.

Weaver knew he was there was unlawfully is “superfluous.” Suppl. Br. of Resp’t at 8. This argument directly refutes the State’s concession that Mr. Weaver’s knowledge that the entry was unlawful is an element of the crime under the law of the case doctrine. Suppl. Br. of Resp’t at 6. Again, the fact that it is an element that adds to the statutory definition is of no legal significance. *Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (“In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the ‘to convict’ instruction.”). At this point, the State cannot get around the fact that it was required to prove Mr. Weaver knew he was in the building unlawfully. Nor can it escape the fact that Instruction No. 14 explicitly relieved the State of its burden to do so.

Where the only contested issue was whether Mr. Weaver believed he was there lawfully; the State cannot show that the instructional error as to that very issue was harmless. This Court should reverse and remand for a new trial.

C. CONCLUSION

For the above stated reasons, this Court should reverse Mr. Weaver’s conviction for Criminal Trespass in the First Degree, and remand for a new trial.

DATED this 16th day of April, 2019.

Respectfully submitted,

s/Devon Knowles

WSBA No. 39153

Washington Appellate Project

1511 Third Avenue, Suite 610

Seattle, Washington 98101

Telephone: (206) 587-2711

Email: devon@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

| | | |
|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 51734-5-II |
| v. |) | |
| |) | |
| SAMMY WEAVER, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF APRIL, 2019, I CAUSED THE ORIGINAL **SUPPLEMENTAL REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION ONE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|----------------------------------|-----|---------------|
| [X] TIMOTHY HIGGS | () | U.S. MAIL |
| [timh@co.mason.wa.us] | () | HAND DELIVERY |
| MASON COUNTY PROSECUTOR'S OFFICE | (X) | E-SERVICE |
| PO BOX 639 | | VIA PORTAL |
| SHELTON, WA 98584-0639 | | |
| | | |
| [X] SAMMY WEAVER | (X) | U.S. MAIL |
| 4400 NE HURD RD | () | HAND DELIVERY |
| BELFAIR, WA 98528 | () | _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF APRIL, 2019.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

April 16, 2019 - 4:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51734-5
Appellate Court Case Title: State of Washington, Respondent v. Sammy B. Weaver, Appellant
Superior Court Case Number: 17-1-00298-4

The following documents have been uploaded:

- 517345_Briefs_20190416162101D2804281_7044.pdf
This File Contains:
Briefs - Appellants Reply - Modifier: Supplemental
The Original File Name was washapp.041619-07.pdf

A copy of the uploaded files will be sent to:

- timh@co.mason.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Devon Carroll Knowles - Email: devon@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190416162101D2804281